APPENDIX "A"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

CLARK

v.

BARLOW

8278 C. A.

The gravamen of the plaintiff's charges is that the defendant committed fraud in obtaining a release from the plaintiff by giving false testimony in the New York cases and concealing any rights that the defendant might have acquired under the reassignment to himself from the Marlin-Rockwell Corporation. I do not find any false statements in the testimony of the defendant in the New York cases. The release was executed in a suit in which the plaintiff claimed an accounting and in which the defendant denied facts which might have established a confidential relationship between the parties. The release was a settlement of all claims of the plaintiff against the defendant in order to end the litigation. The plaintiff has delayed for many years any attempt to make the claims that he now puts forth. When he heard that the defendant had made a claim against the Government he wrote to the defendant "How about splitting up some of this claim with your old partner." This was not a claim as of right but a mere request.

Both parties have moved for summary judgment. The motion of the plaintiff will be overruled; that of the defendant sustained.

BAILEY

J.

APPENDIX "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

JOHN F. CLARK, *Plaintiff*,

v.

LESTER P. BARLOW, ET AL., *Defendants*.

Civil Action No. 8278

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This action having been heard by the Court upon the motion of the plaintiff for summary judgment and the motion of the defendant, Lester P. Barlow, for summary judgment, the Court hereby makes the following findings of fact and conclusions of law.

Findings of Fact.

1. Plaintiff and defendant Barlow signed an agreement dated October 22, 1915. A copy of this agreement is attached to the First Amended Complaint as Exhibit "A".

2. On October 25, 1916, and again on May 6, 1918, the defendant Barlow advised the plaintiff that he denied that said contract of October 22, 1915, related to, or was intended to relate to, any of the bombs, applications for patents thereon, or patents thereon which are the subject matter of the case at bar and for the infringement of which the Congress of the United States awarded the defendant Barlow, by Private Act of September 6, 1940, the sum of $592,719.21.

3. On January 29, 1918, defendant Barlow entered into

a contract with Marlin-Rockwell Corporation, a New York corporation, by which he assigned and transferred his entire interest in the bombs, the invention thereof, and the application for patents thereon, and thereafter the patents upon said bombs were issued to said corporation. Included in these patents were the patents for the infringement of which the said Act of Congress directed the payment to the defendant Barlow the said sum of $592,719.21. A copy of said contract is attached to the affidavit of defendant Barlow verified September 20, 1940, and filed herein.

4. Marlin-Rockwell Corporation filed no suits for infringement of said patents and defendant Barlow filed no suits in the name of Marlin-Rockwell for infringement of said patents.

5. The plaintiff acquired full knowledge of the said contract between the defendant Barlow and Marlin-Rockwell Corporation some time prior to the year 1921.

6. Defendant Barlow instituted two actions, one in the Supreme Court of New York County, State of New York, and the other in the United States District Court for the Southern District of New York, on October 18, 1918, and April 25, 1921, respectively, against Marlin-Rockwell Corporation to compel said corporation to account to and pay to him amounts of money which had become due to him from said corporation under the said contract between him and it of January 29, 1918.

7. The plaintiff Clark was interpleaded as a party defendant in each of said actions referred to in Paragraph 6 and appeared and filed a counterclaim in each of said actions wherein he claimed that pursuant to the said contract of October 22, 1915, referred to in Paragraph 1 hereof, he was entitled to a one-half share in the inventions and patents and in income and royalties therefrom which were transferred to Marlin-Rockwell Corporation by the defendant Barlow by the said contract of January 29,

1918. In his said counterclaim the plaintiff claimed an accounting for all royalties and income from said patents then due or which thereafter might become due from any source. The defendant Barlow in said actions denied that the plaintiff had any interest of any kind, character or description in the said patents and denied his right to any accounting.

8. In his counterclaim in said actions the plaintiff made the following allegations:

> "XVI. Upon information and belief, that the said defendant John F. Clark has duly demanded of the plaintiff that he assign to him a one-half interest in and to said bomb and improvements thereon, together with a one-half interest in all patents, and rights in applications for patents upon the said bomb and improvements thereon and a one-half interest in all and any moneys received and to be received as royalties or otherwise, from the sale, manufacture or use of said bomb or improvements thereupon; but that the plaintiff has refused and still refuses to assign to the said defendant John F. Clark, a one-half interest as aforesaid, or any interest whatsoever.
>
> * * * * *
>
> "4. That he is entitled to a one-half interest in and to all moneys received or to be received by the plaintiff from the Marlin-Rockwell Corporation, or from any other source whatsoever, as royalties or otherwise for the sale, manufacture and use of the said bomb and improvements thereon."

9. The bombs, inventions, and patents thereon, which were the subject matter of said actions, include the same bombs for the infringement of the patents thereon the Congress of the United States, by the said Act, directed the payment to the defendant Barlow of the said sum of $592,719.21.

10. The action in the said State Court of New York was tried in February, 1921, and the said Federal Court action was tried in January, 1924.

11. During the pendency of the said New York Federal and State court actions plaintiff and defendant Barlow, through their respective counsel, entered into an agreement to settle all disputes and claims existing between them in consideration of the payment by the defendant Barlow to the plaintiff of $12,000.00. To carry out this agreement the following stipulation was signed on December 8, 1924, by counsel for plaintiff and defendant Barlow, and filed in said actions:

> "IT IS HEREBY STIPULATED, that the defendant, John F. Clark, settles all claims against Lester P. Barlow, by the payment to him or his attorneys by Barlow in the sum of $12,000. Said Clark hereby releases the balance of said funds, and further covenants and agrees to execute and deliver to Lester P. Barlow a general release of all claims and causes of action whatsoever. Upon payment of said money, said Clark through his attorney will sign a consent to discontinue the above actions without costs to any party as against the others. The sum of $12,000 to be paid upon the delivery of the general release by the defendant, Clark."

12. As a further condition to the agreement referred to in Paragraph 11, plaintiff, on December 26, 1924, executed and delivered to defendant a general release in words and figures as follows:

> "TO ALL TO WHOM THESE PRESENTS SHALL COME or may concern, greeting; know ye, That John F. Clark, of the City of Los Angeles, County of Los Angeles, and State of California, for and in consideration of the sum of Twelve Thousand Dollars lawful money of the United States of America, to me in hand paid by Lester P. Barlow, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these Presents do for myself heirs, executors and administrators, remise, release and forever discharge the said Lester P. Barlow, his heirs, executors and administrators, of all and from all, and all manner of action and ac-

tions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against him, I, John F. Clark, ever had, now have or which my heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 26th day of December, nineteen hundred and twenty-four.

Sealed and Delivered in the Presence of Witness:
(Signed) W. R. Law

(Signed) John F. Clark

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES. ss:

On the 26th day of December, nineteen hundred and twenty-four before me came John F. Clark, to me known to be John F. Clark, the individual who described in, and who executed, the foregoing instrument, and acknowledged that he did execute the same.

(Signed) W. R. Law

My Commission expires Nov. 2, 1925.

Notary Public
In and for the County of
Los Angeles, State of California"

13. Plaintiff received the $12,000.00 consideration for the aforesaid settlement.

14. On August 3, 1923, because Marlin-Rockwell Corporation became financially embarrassed, and in receivership defendant Barlow, in settlement of all claims which he might have against Marlin-Rockwell Corporation by reason of his said contract with it, including claims for a large amount of money payable yearly by the corporation,

received from Marlin-Rockwell Corporation an assignment of all claims of any kind, character or description which the corporation might have against the United States of America or any other Government, partnership, corporation or individual for use or infringement of the patents involved in the case at bar, as well as numerous other patents. On August 9, 1923, Marlin-Rockwell Corporation assigned to the defendant Barlow a large number of domestic and foreign patents, including those herein involved. This assignment of August 9, 1923, was not filed in the United States Patent Office until November 8, 1927, more than four years after its delivery to defendant Barlow. No explanation is made by defendant Barlow for withholding this document from the records of the United States Patent Office. The claims thus assigned to the defendant Barlow on August 3, 1923, included the claim for which the money involved in the case at bar was appropriated by the Congress by the Act of September 6, 1940.

15. In the trial of the New York State case, defendant Barlow was cross-examined by attorneys for plaintiff Clark to ascertain from what other sources, if any, other than the Marlin-Rockwell Corporation, patent royalties were due, during which cross-examination the following questions were asked and Barlow made the following answers:

1 "Q. Have you received anything for your depth bombs?
A. Nothing.

2 Q. Have you received anything for any aerial bombs from the Government?
A. No.

3 Q. No royalties?
A. I waived my royalties to the Secretary of War—I wrote him a letter.

4. Q. Did you ever get patents on any of these articles?
A. Yes.

5. Q. Do you own the patents now?
   A. Yes, they are here.
6. Q. Do you own patents in any foreign countries now?
   A. No."

16. No allegation was made herein and no evidence offered that said testimony of the defendant Barlow was false. Said testimony was not false.

17. At the time the defendant Barlow testified as aforesaid in the State court action, plaintiff had full and complete knowledge of the contract of January 29, 1918, between the defendant Barlow and Marlin-Rockwell Corporation. Plaintiff offered the said contract in evidence in said State court action and it was received in evidence therein.

18. At the time said testimony was given defendant Barlow had received from the Marlin-Rockwell Corporation portions of royalties paid by the United States to the Marlin-Rockwell Corporation and the suits then in litigation were amongst other matters with respect to sums due to Barlow arising out of royalties paid to the Marlin-Rockwell Corporation by the United States. Barlow's cross-examination by counsel for Clark was to ascertain from what sources other than Marlin-Rockwell Corporation, royalties were due.

19. When defendant Barlow testified he owned patents obtained from the United States Government, he did not own the patents involved in this suit, which patents were owned by Marlin-Rockwell Corporation. In the letter Barlow wrote to Assistant Secretary of War Crowell, quoted below, proposing to waive future royalties upon request, he also stated that bombs being manufactured for the United States Government were being manufactured under his patent.

20. At the same time defendant Barlow testified, he did not own any patents in foreign countries, although at that

time the Marlin-Rockwell Corporation owned six patents in Great Britain and five patents in each of the following countries, to-wit, France, Italy, Belgium and Canada, issued on Barlow inventions, and twelve patents in the United States issued on Barlow inventions.

21. The aforesaid testimony of the defendant Barlow was not intended to and did not in any way deceive or mislead the plaintiff.

22. On September 22, 1918, the defendant Barlow had written to the Secretary of War of the United States as follows:

"Washington, D. C., September 22, 1918.

Hon. Benedict Crowell,
Acting Secretary of War, Washington, D. C.

My Dear Mr. Crowell: I have recently returned from France. While there I witnessed the field tests of aerial bombs, among which were the Barlow bombs.

In France I was amazed at the wonderful progress that has been made in practically all branches of the service. I believe that any person or persons who have been in France recently and who has had the opportunity to see the Americans at work, feel that seemingly impossible tasks are now being accomplished.

I believe that our aircraft program is far behind and that our aircraft bombing program is in a terrible plight.

I shall make vigorous efforts and do my part in getting the bombing program going smoothly as soon as possible. There are hundreds of thousands of bombs finished or being finished in this country which are built or being built under my patent. If there are any legal Government forms necessary for me to sign in waiving my rights to any future royalty which might become due me through future bomb contracts, I shall be pleased to sign them on request from the War Department. I am willing to make the above financial sacrifice as proof that my future activities,

insofar as our bombing program is concerned, are not inspired by mercenary motives.

Very truly yours,

BARLOW."

23. At the time said testimony was given defendant Barlow had not released and relinquished all rights to royalties from the United States Government. Barlow offered by letter, if requested by the War Department, to waive all his rights to royalties on future contracts made with the United States Government. Said letter was delivered personally to the Assistant Secretary of War Crowell, then Acting Secretary of War, and the offer was refused by him. While defendant Barlow knew of the rejection of said proposal, plaintiff Clark and his attorneys knew nothing of said letter or the rejection.

24. Plaintiff knew that sales of bombs were to be made by Marlin-Rockwell Corporation to the United States Government.

25. The plaintiff delayed for many years any attempt to make the claims put forth in this suit. He knew of the defendant Barlow's claim against the United States some time prior to October 11, 1937, and on that date wrote to the defendant: "How about splitting up some of this claim with your old partner".

26. The release executed by the plaintiff on December 26, 1924, referred to in Paragraph 12 hereof, was not induced or procured by any fraud committed by the defendant Barlow or any other person, and was a settlement of all claims of the plaintiff against the defendant in order to end the litigation in the New York State court and the District Court of the United States for the Southern District of New York.

Conclusions of Law.

1. The release executed by the plaintiff on December

26, 1924, released the defendant Barlow from all claims of any kind, character or description which the plaintiff might have against him and discharged him of all obligations of any kind, character or description which he might owe to the plaintiff, including the obligations of any existing contract.

2. The contract of January 29, 1918, between defendant Barlow and Marlin-Rockwell Corporation by its terms contemplated the manufacture and sale of bombs made pursuant to defendant Barlow's patents to the Government of the United States.

3. In the said actions in New York the plaintiff herein as the basis for his counterclaim and claim for accounting necessarily asserted the existence of a fiduciary relationship between himself and the defendant Barlow. When the plaintiff Clark accepted $12,000.00 in settlement of those suits he abandoned his claim that a fiduciary relationship existed and is estopped from re-asserting that claim for the purpose of seeking to set aside the settlement and release. The abandonment of the claim that a fiduciary relationship existed, the establishment of which would have justified an accounting, was the consideration for the $12,000.00 paid by the defendant Barlow to the plaintiff herein.

4. The plaintiff Clark is not entitled to equitable relief because he was not diligent in the assertion of his claim.

5. The assignment by Marlin-Rockwell Corporation to the defendant Barlow on August 3, 1923, and referred to in Paragraph 14 hereof, was null and void as a claim against the United States by reason of the provisions of Section 3477 of the Revised Statutes of the United States (U. S. Code, Title 31, Section 203).

6. Defendant Barlow had no claim against the United States of America by reason of the assignment to him of the claims of Marlin-Rockwell Corporation against the United States for the infringements of the patents referred

to herein until the enactment of the Act of March 3, 1927, 44 Stat. Part 3, p. 1844.

7. The motion for summary judgment filed by the plaintiff should be overruled.

8. The motion for summary judgment filed by the defendant Barlow should be granted.

[SIGNED] JENNINGS BAILEY,
Justice.

Service of a copy of the foregoing revised findings of fact and conclusions of law acknowledged this 22nd day of January, 1941.

[SIGNED] HARRY B. HAWES,

[SIGNED] CARL L. RISTINE.

APPENDIX "C"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7831

JOHN F. CLARK, *Appellant*

v.

LESTER P. BARLOW, *et al*

Appeal from the District Court of the United States for the District of Columbia

Decided August 18, 1941

Carl L. Ristine, of Washington, D. C., for appellant.

Joseph R. McCuen, of Washington, D. C., for appellee Barlow.

Edward M. Curran, United States Attorney, and *William S. Tarver*, Assistant United States Attorney, both of Washington, D. C., for appellees Morgenthau and Julian.

Before GRONER, Chief Justice, and MILLER and VINSON, Associate Justices

MILLER, *Associate Justice*: In 1915 appellant, a lawyer, and appellee, an inventor, entered into a contract concerning an aerial torpedo bomb "and patents or any improvements or additions . . . to said bomb or patents as well as . . . moneys . . . received from the sale of said bomb or as royalty" therefor. Subsequently appellee abandoned his original application for a patent and denied that any effective contract still existed between himself and appellant. However, he continued his experiments with aerial bombs; and as the years went by he continued in disagreement with appellant as to whether the 1915 contract cov-

ered his new discoveries; appellant contending that the bombs, applications for patents and patents which are the subject of the present suit were improvements upon and additions to the original bomb; appellee contending that they were not.

In January, 1918, appellee entered into a contract by which he assigned the bombs, patents and applications for patents, here involved, to Marlin-Rockwell Corporation. Thereafter, in October, 1918, and in April, 1921, appellee instituted two actions in New York; one in the State Supreme Court of New York and the other in the United States District Court for the Southern District of New York; against Marlin-Rockwell Corporation, for accountings and for money due under the contract of January, 1918. Appellant was interpleaded as a party defendant in each of the two actions; he appeared and filed a counterclaim in each; alleging that under the 1915 contract he was entitled to a one-half share in the inventions and patents which had been transferred to the Marlin-Rockwell Corporation, and in income and royalties therefrom; and claiming an accounting for all royalties and income therefrom then due, or which thereafter might become due from any source. The action in the New York state court was tried in February, 1921, and the federal court action in January, 1924, but both were still pending when, on December 8, 1924, appellant signed the following stipulation which was thereupon filed in both actions:

> IT IS HEREBY STIPULATED, that the defendant, John F. Clark, settles all claims against Lester P. Barlow, by the payment to him or his attorneys by Barlow in the sum of $12,000. Said Clark hereby releases the balance of said funds, and further covenants and agrees to execute and deliver to Lester P. Barlow a general release of all claims and causes of action whatsoever. Upon payment of said money, said Clark through his attorney will sign a consent to discontinue the above actions without costs to any party as against

the others. The sum of $12,000 to be paid upon the delivery of the general release by the defendant, Clark.

Pursuant to the terms of the stipulation, appellant received the specified $12,000 and executed the following release:

> "TO ALL WHOM THESE PRESENTS SHALL COME or may concern, greeting; know ye, That John F. Clark, of the City of Los Angeles, County of Los Angeles, and State of California, for and in consideration of the sum of Twelve Thousand Dollars lawful money of the United States of America, to me in hand paid by Lester P. Barlow, the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these Presents do for myself heirs, executors and administrators, remise, release and forever discharge the said Lester P. Barlow, his heirs, executors and administrators, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against him, I, John F. Clark, ever had, now have or which my heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents. . . .

In the meantime, in 1923, the Marlin-Rockwell Corporation had become financially embarrassed and had gone into receivership. In August of that year it had assigned to appellee—in settlement of all claims which he might have against it—a large number of foreign and domestic patents including those here involved, together with all claims which it might have against the United States of America or any other government, partnership, corporation or individual, for use or infringement of the patents involved in the present case, as well as numerous other

patents. The assignment from Marlin-Rockwell Corporation, so far as it concerned claims against the United States, fell within the prohibition of the federal statute [1] and hence was invalid. However, in 1927, Congress conferred jurisdiction on the Court of Claims of the United States to determine the amount due on the claim here involved;[2] and, after that determination had been made,[3] Congress, on September 6, 1940, awarded to appellee $592,719.21.[4]

Relying upon his contract of 1915, and for the purpose of enforcing an equitable lien in this award, appellant, thereafter, sued appellee, together with the Secretary of the Treasury and the Treasurer of the United States, in the District Court of the United States for the District of Columbia. The two officials answered; alleged that they had no interest in the controversy, except as stakeholders; and asked the court to instruct them as to the disposition which should be made of the fund. Both appellant and appellee moved for a summary judgment. The trial court denied appellant's motion and granted that of appellee.

Several issues which were presented to the trial court are renewed on this appeal. The most important of these concerns the effect of the stipulation and release executed by appellant in 1924. He now contends that they were void, and hence ineffective to bind him because, he says, they were procured by false and fraudulent representations, and by concealment of facts which appellee was under a fiduciary duty to disclose. The following facts, found by the trial court, lend color to appellant's contention: (1) Although the reassignment from Marlin-Rockwell Corporation to appellee was made on August 3, 1923, more than a year prior to the filing of the stipulation and

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[1] R. S. § 3477, 31 U. S. C. A. § 203.
[2] Act of March 3, 1927, 44 Stat. (Part 3) 1844.
[3] *Barlow* v. *United States*, 87 C. Cls. 287. See also, 82 *id.*, at 360.
[4] Private Law No. 555, 76th Cong., 3d Sess. (1940).

release executed by appellant, it was not filed in the United States Patent Office until November 8, 1927, more than four years after its execution and delivery, and approximately three years after the appellant's release was executed; (2) in the trial of the action in the New York state court in 1921, appellee, on cross-examination, testified as set out in the margin,[5] but, apparently contrary to appellee's answer as then given, (3) he had received from Marlin-Rockwell Corporation portions of royalties paid by the United States, (4) he did not own the patents involved in this suit, (5) although appellee wrote a letter to the Acting Secretary of War in which he offered, on request, to waive any royalties which might become due to him through future contracts, the offer was refused by the Acting Secretary of War, and at the time of his cross-examination appellee had not released or relinquished all rights to royalties from the United States Government; (6) while appellee know of the rejection of his proposal to waive, neither appellant nor his attorneys knew anything about the letter or its rejection.

However, the court also found that (1) the cross-examination of appellee, during which the answers noted were given, was for the purpose of ascertaining from what sources, if any, *other than* the Marlin-Rockwell Corporation, patent royalties were due; (2) appellant had, at the time of the cross-examination full and complete knowledge

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[5] "Q. Have you received anything for your depth bombs?
"A. Nothing.
"Q. Have you received anything for any aerial bombs from the Government?
"A. No.
"Q. No royalties?
"A. I waived my royalties to the Secretary of War—I wrote him a letter.
"Q. Did you ever get patents on any of these articles?
"A. Yes.
"Q. Do you own the patents now?
"A. Yes, they are here.
"Q. Do you own patents in any foreign countries now?
"A. No."

of the 1918 contract between appellee and Marlin-Rockwell Corporation and he, himself, introduced it into evidence at the same trial as that at which the cross-examination occurred; (3) appellant knew that sales of bombs were to be made by Marlin-Rockwell Corporation to the United States Government; (4) appellant also knew, at the time the testimony of appellee was given, that appellee had received from Marlin-Rockwell Corporation portions of royalties paid by the United States to Marlin-Rockwell, because the suits then in litigation—and to which appellant was a party—involved, among other matters, sums due to appellee arising out of royalties paid to Marlin-Rockwell Corporation by the United States; (5) although appellee did not own the patents, they were owned by Marlin-Rockwell Corporation, by virtue of the 1918 contract, of which appellant was fully informed; (6) the testimony of appellee was not intended to and did not deceive or mislead appellant.

These latter findings clearly dispose of appellant's contention that appellee made false or fraudulent representations to him. There remains, however, his contention that appellee concealed facts which he was under a fiduciary duty to disclose; particularly as concerns (1) his failure, for one year prior to and three years after appellant's release was executed, to file the assignment from Marlin-Rockwell Corporation in the United States Patent Office; and (2) his failure to testify, on cross-examination, that his offer to waive royalties had been rejected by the Acting Secretary of War. There are several answers to this contention. In the first place, whatever fiduciary relationship there may have been, as a result of the contract of 1915, clearly no such relationship existed either at the time of the trial in 1921, or at the time of the reassignment of 1923. The trial court found that in 1916, and again in 1918, appellee advised appellant that the 1915 contract did not relate to and was not intended to relate to "any of

the bombs, applications for patents thereon, or patents thereon which are the subject matter of the case at bar." This alone was sufficient to put appellant on notice that if he thought he had any rights he should take steps to protect them and that appellee had repudiated any previously existing fiduciary relation.[6]

In the second place, as the trial court found, appellee, in 1918, assigned to Marlin-Rockwell Corporation his entire interest in the bombs, the invention thereof, and the application for patents thereon, and thereafter the patents upon the bombs were issued to that Corporation. Of this assignment appellant was fully informed prior to the year 1921. Also, in 1918, and again in 1921, when appellee commenced actions against Marlin-Rockwell Corporation, appellant was interpleaded as a party defendant—adverse to appellee; in his counter-claim in each action appellant claimed a one-half share in the inventions, patents, income and royalties; and appellee, in each of the two actions, denied that appellant had any interest of any kind, character or description. It was after all this had occurred that the first alleged concealment took place. At that time, on trial in the New York state court, appellant and appellee were adversary parties; each was represented by counsel; the issues between them had been defined by pleadings in which the very existence of facts out of which any fiduciary relationship might have grown, were denied. Yet, appellant relies upon answers then given by appellee under cross-examination to show concealment upon which he, as one occupying a fiduciary relationship, is entitled to rely.

Again, appellee's answers on cross-examination fail to show concealment, in any event. Anyone who is familiar with courtroom practice is well aware of the rapid-fire manner in which cross-examination takes place. At the

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[6] *Cleaveland* v. *Richardson*, 132 U. S. 318; *Mallory* v. *Leach*, 35 Vt. 156, 166, 82 Am. Dec. 625, 628; *Banner* v. *Rosser*, 96 Va. 238, 246, 31 S. E. 67, 70. *Cf. Ferguson* v. *Lowery*, 54 Ala. 510, 25 Am. Rep. 718.

New York trial, appellee was asked whether he had received anything for aerial bombs from the Government. Appellant's counsel, in asking the question, well knew that Marlin-Rockwell had received something, and that appellee had received a portion thereof. He and appellant both understood, therefore, that appellee's answer excepted payments made to Marlin-Rockwell Corporation. It was then that appellee volunteered the statement: "I waived my royalties to the Secretary of War . . . I wrote him a letter." The conclusion is inescapable that appellant knew this statement also excepted payments made to Marlin-Rockwell Corporation by the Government, which payments had been in part distributed to appellee and which constituted the very substance of the trial then under way. Moreover, appellee's statement, thus volunteered, even as it related to other royalties on future contracts, far from constituting concealment, was, instead, a revelation of information. It amounted to an invitation to inquire further as to the nature and contents of the letter. But appellant's counsel did not accept the invitation. He, not appellee, was in control of the examination, and he chose to go forward to another subject: "Did you ever get patents on any of these articles?"

So far as concerns the reassignment, and appellee's failure to file it in the United States Patent Office, it will be remembered that this occurred in 1923, approximately two years after the trial of the action in the New York state court, in which appellee and appellant appeared as adversary parties, and five or six years after appellee had advised appellant of his adverse position concerning the 1915 contract. There is no basis here, therefore, upon which to urge concealment of facts which appellee was duty bound to reveal. Appellee consistently maintained his position from 1916 on, that appellant had no interest in the inventions here involved; he denied, on several occasions, that the 1915 contract was still operative; he put

appellant on notice, in a variety of ways, that his position was adverse to that of appellant; he left no basis upon which appellant could assume or rely upon the continuance of a fiduciary relationship.[7] "One cannot close his eyes to the obvious and then claim to be deceived." [8] Appellant, by his letters to appellee, as well as by joining issue with him on at least two occasions, in the actions of 1918 and 1921, indicated his recognition of the changed relationship.

One who relies upon fraud, misrepresentation, or concealment, must sufficiently allege and prove it.[9] In the present case there is no basis upon which such a defense can be maintained. Consequently, appellant is bound by his stipulation and release. That release, in turn, is comprehensive and inclusive. The law favors the settlement of litigation and the compromise of disputed claims.[10] If such a release, made under the circumstances of the present case, could be repudiated, there would be no end to litigation.[11] It is not necessary for us to consider the other points urged by appellant.

Affirmed.

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[7] *Andrus* v. *St. Louis Smelting and Refining Co.*, 130 U. S. 643, 647: "The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity; nor will industrious activity in other directions, to the neglect of such means, be of any avail."

[8] *Del Rio* v. *Ulen Contracting Corp.*, 5 Cir., 94 F. (2d) 701, 703.

[9] *Lalone* v. *United States*, 164 U. S. 255, 257; *Public Motor Service, Inc.* v. *Standard Oil Co.*, 69 App. D. C. 89, 91, 99 F. (2d) 124, 126; *Security Investment Co.* v. *Garrett*, 3 App. D. C. 69, 76; *Equitable Life Assur. Soc.* v. *Johnson*, 6 Cir., 81 F. (2d) 543, 547.

[10] *Williams* v. *First Nat. Bank*, 216 U. S. 582, 595; *St. Louis Mining & Milling Co.* v. *Montana Mining Co.*, 171 U. S. 650, 656; *McMahon* v. *Matthews*, 48 App. D. C. 303, 309: "The law encourages the compromise of disputes and looks with favor on all proper efforts in that direction."; *Miller* v. *Pyrites Co., Inc.*, 4 Cir., 71 F. (2d) 804, 810, *cert. denied*, 293 U. S. 604. See *Tulsa City Lines, Inc.*, v. *Mains*, 10 Cir., 107 F. (2d) 377, 380.

[11] *Cf. Hennessy* v. *Bacon*, 137 U. S. 78, 85; *The Katie M. Hagan*, E.D. Pa., 98 F. 995, 996; *Randall* v. *Port Huron, St. C. & M. C. Ry.*, 215 Mich. 413, 423, 184 N. W. 435, 438